Westerman, Inc. *and* United Steelworkers of America, AFL-CIO. Case 9-CA-15889(E)

May 12, 1983

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JENKINS AND ZIMMERMAN

On January 20, 1983, Administrative Law Judge Claude R. Wolfe issued the attached Supplemental Decision in this proceeding. Thereafter, the Applicant filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Supplemental Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge as modified herein[1] and to adopt his recommended Order.

ORDER

It is hereby ordered that the application of the Applicant, Westerman, Inc., Bremen, Ohio, for an award under the Equal Access to Justice Act be, and it hereby is, denied.

[1] The Administrative Law Judge stated that the General Counsel presented no evidence in the underlying unfair labor practice case in support of the complaint allegation that the Applicant, through its supervisor, Robert Knight, created an impression among its employees that their union activities were under surveillance by the Applicant. We note, however, that in the Administrative Law Judge's Decision in the underlying unfair labor practice case (not published in the Board's bound volumes), he did not find that the General Counsel presented no evidence in support of this allegation, but rather that "[t]he *evidence does not . . . show*, as the complaint alleges, that Knight created an impression of surveillance of employee union activities" (emphasis supplied). In dismissing the impression-of-surveillance allegation, the Administrative Law Judge relied on the fact that it was an employee who broached the subject of how Knight would know who was at the union meeting, and that all Knight did was give a noncommittal answer.

In any event, we agree with the Administrative Law Judge, for the reasons he sets forth, that the impression-of-surveillance allegation was not, under the circumstances, a "significant" portion of the unfair labor practice proceeding, and that the Applicant is therefore not eligible to apply for an award of fees and other expenses incurred in responding to that allegation.

SUPPLEMENTAL DECISION

CLAUDE R. WOLFE, Administrative Law Judge: On June 10, 1982, the Board, in the absence of any exceptions filed, issued its unpublished Order adopting the findings and conclusions in my Decision issued May 3, 1982, finding that Respondent had committed certain violations of Section 8(a)(1) of the Act, but dismissing complaint allegations of 13 discharges in violation of Section 8(a)(3) of the Act and an allegation that Respondent had created an impression of surveillance of employee union activities in violation of Section 8(a)(1) of the Act.

On July 9, 1982, Westerman, Inc., hereinafter called Applicant, filed an application for attorney fees and expenses under the Equal Access to Justice Act[1] together with a motion to withhold confidential financial information from public disclosure.

On July 23, 1982, the General Counsel filed a motion to dismiss the application because (1) fees and expenses incurred prior to October 1, 1981, the effective date of the Equal Access to Justice Act, are not recoverable; (2) the General Counsel's litigation position was reasonable in law and fact; and (3) Applicant did not prevail on a discrete substantive portion of the proceeding. By order of August 23, 1982, I denied the General Counsel's motion as incorrect on points 1 and 3, and deferred dealing with the issue of the General Counsel's reasonableness until the General Counsel submitted his answer to the application together with his supporting evidence and argument. By the same order, I granted Applicant's unopposed motion to withhold confidential financial information from public disclosure.

The General Counsel repeated the same three grounds in his answer filed September 20, 1982, and further contends that fees and expenses incurred before a complaint issues or incurred in the proceeding to recover fees and expenses are not recoverable. The General Counsel also challenges the adequacy of the application with respect to fee documentation, description of the employee complement, and net worth statement.

Applicant then filed, on October 13, 1982, motions for an oral hearing and oral argument, a date certain for submission of fee data, and a reply brief to the General Counsel's answer. Applicant's motions for hearing, oral argument, and date for submission of fee data are denied. Its reply brief has been carefully considered.

Upon the entire record, including the official report of proceedings in the unfair labor practice case, the following findings and conclusions are appropriate.

The General Counsel contends that Applicant did not prevail on a discrete substantive portion of the proceeding. I do not agree. To conclude, as the General Counsel argues, that the layoff of 13 employees is not a discrete portion because the threats of termination of plant closure "shared a close and intimate relationship with the allegations of unlawful layoff" would be an ingenious exercise at best. The layoffs were specifically alleged as violations of Section 8(a)(3) and, derivatively, (1) of the Act. The threats were alleged and found to be independent violations of Section 8(a)(1). Apart from the obvious fact that the 8(a)(1) violations may be evidence supporting the 8(a)(3) allegations, the two classes of violations are plainly distinct and separately litigable. There is no need to further belabor the point in view of the General Counsel's limited argument described above, and I find the Applicant did prevail on a "significant and discrete substantive portion" of the unfair labor practice proceed-

[1] P.L. 96-481, 94 Stat. 2325, and see Sec. 102.143 of the Board's Rules and Regulations.

ing, as defined in the Board's Rules and Regulations,[2] when the 8(a)(3) allegations were dismissed.

The General Counsel presented no evidence in support of the complaint allegation that Applicant violated Section 8(a)(1) of the Act by creating an impression of surveillance of employee union activities. Whether this allegation standing alone is a "discrete substantive portion" of the proceeding or not, it was not a "significant" portion. All of the violations alleged in the complaint other than the layoffs were therein ascribed to Supervisor Robert Knight. The impression of surveillance allegation was one of five specifications, as amended, of Knight's alleged unlawful behavior. Given the complaint attribution of all unlawful statements to Knight, I find it most probable that Applicant's able counsel queried Knight about his entire course of conduct with respect to employee union activity in the normal course of hearing preparation, and I cannot believe that investigating whether Knight said or did anything likely to convey an impression of surveillance to employees consumed more than a minimal amount of the time required to discuss his alleged transgressions with him. Bearing in mind that the 13 allegedly unlawful layoffs are described by Applicant as "the gravamen of the entire case," and considering Applicant's claim that it would have settled the case if the complaint had only alleged violations of Section 8(a)(1), I am persuaded that the impression of surveillance allegation was not a matter of great concern to Applicant except to the extent that it might be evidence supportive of the 8(a)(3) allegations. On the whole, it seems to me that this single allegation of an 8(a)(1) violation by Knight, who was charged with several other 8(a)(1) violations, was neither a "significant portion" of the proceeding on the face of the amended complaint nor a cause of measurable additional legal expense to Applicant. Accordingly, the issue of whether this allegation was substantially justified need not be resolved.

The various challenges of the General Counsel to the form and content of the net worth exhibit, description of employee complement, and fee document are easily remedied by simple amendment, which Applicant has expressed a willingness to do, and the General Counsel has not yet identified any fatal defect in the application. The computation of any fees and expenses due only becomes relevant after a finding of liability therefor. There is no need to venture into these areas because I am persuaded for the following reasons that the General Counsel was substantially justified in proceeding to hearing on the allegations of unlawful layoff.

The General Counsel's failure to win raises no presumption that he was not substantially justified in pressing the allegation that the layoffs were unlawful.[3] Moreover, the General Counsel is not required to establish that his decision to litigate the issue was based on a substantial probability of prevailing,[4] nor does a failure of the General Counsel to establish a *prima facie* case necessarily require a finding that his position was not substantially justified.[5] The applicable test is whether the General Counsel's litigation position had a reasonable basis in law and fact.[6]

In assessing reasonable one must be reasonable. It is the position of the General Counsel *before* my contrary decision issued which must be examined.

Preliminary to this examination, Applicant's reference to the General Counsel's amendment of the complaint on the first day of the hearing to add six laid-off employees to the seven already alleged should be dealt with. My Decision noted that the General Counsel was aware of the layoff of the added six quite some time before the hearing, but also pointed out the delay did not defeat the amendment and Applicant's defense was not thereby injured because he was granted a 2-month continuance to prepare. Applicant filed no exception to this finding, and whether or not this delay in amending occasioned delay in the hearing it is not relevant to the issue of whether the General Counsel had a reasonable basis upon which to prosecute these layoffs or the other seven.

The General Counsel proved union activity, company knowledge of that activity, expressions by a supervisor of Respondent hostility to such activity accompanied by threats of lost jobs as a result of such activity, and a closely following layoff. The evidence of the timing of Respondent's first knowledge was ambiguous, and my conclusion that this knowledge came into being after Respondent decided to have a layoff was not something, in view of the evidence presented on the point, that the General Counsel could necessarily have forecast. Notwithstanding that I adhere to my decision it cannot fairly be said that reasonable men might not have differed on this point. Similarly, my finding that Knight's statements should not, in the circumstances, be treated as an accurate reflection of Respondent's attitudes and intentions is not entirely beyond dispute.[7] Had the General Counsel prevailed on these two points he would have established a very strong case in favor of finding the entire layoff to be unlawful. Although it cannot now be reasonably maintained, in view of my Decision and the absence of exceptions thereto, that the General Counsel was correct in his position, neither can it be said that his position was frivolous, bereft of reason, or not substantially justified. To the contrary, the General Counsel's position had a reasonable basis in fact and law, and met the statutory requirement of substantial justification.

Accordingly, I find Westerman, Inc., is not entitled to an award under the Equal Access to Justice Act, and issue the following recommended:

[2] Secs. 102.143(b) and 102.144.

[3] *Tyler Business Services v. NLRB*, 111 LRRM 3001, 3002 (4th Cir. 1982); *Heydt v. Citizens State Bank*, 668 F.2d 444 (8th Cir. 1982); *S & H Riggers and Erectors v. O.S.H.R.C.*, 672 F.2d 426 (5th Cir. 1982); *Wyandotte Savings Bank v. NLRB*, 110 LRRM 2929, 2930 (6th Cir. 1982).

[4] *Tyler, supra* at fn. 3; *Heydt, supra* at fn. 3; *S & H Riggers, supra* at fn. 3.

[5] *Enerhaul*, 263 NLRB 890, fn. 3 (1982).

[6] *Tyler, supra* at fn. 3; *Wyandotte, supra* at fn. 3; *Operating Engineers Local 3 v. Bohn*, 541 F.Supp. 486 (D. Utah 1982); *Alspach v. District Director of Internal Revenue*, 527 F. Supp. 225 (D. Md. 1981); *Enerhaul, supra* at fn. 5.

[7] See e.g., *American Art Clay Co.*, 148 NLRB 1209, 1218-19, fn. 16 (1964); *Drico Industrial Corp.*, 115 NLRB 931 (1956).

ORDER

It is hereby ordered that the application of Westerman, Inc., for an award under the Equal Access to Justice Act be, and hereby is, denied.